80-734

Supreme Court, U.S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No._____

SAM PENA and OSCAR NIPPER, Trustee,
Petitioner

v.

DANIEL E. O'CONNELL, Receiver for
CHAMPIONS RACQUET CLUB
ESTATES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Oscar Nipper
7654 Park Place Blvd.
Houston, Texas 77087
(713) 645-6618

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SUPREME COURT OF THE UNITED STATES
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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WRIT OF CERTIORARI

Oscar Nipper
7654 Park Place Blvd.
Houston, Texas 77087
(713) 645-6618

QUESTIONS PRESENTED

This is a controversy arising from a Chapter XI bankruptcy proceeding filed by CHAMPIONS RACQUET CLUB ESTATES, INC. DANIEL E. O'CONNELL, the receiver therein, commenced an adversary proceeding against OSCAR NIPPER, SAM PENA, WILLIAM COOK, W.H. CANTRELL and C.M. KRAUTHAMER. The questions arising therefrom are as follows:

1. Whether the Bankruptcy Court abused its discretion in entering a default judgment against NIPPER and PENA for failing to file a trial statement.

2. Whether the District Court abused its discretion under Federal Rule 60(b) in failing to grant relief to NIPPER and PENA from the default judgment entered in said bankruptcy proceedings.

INTERESTED PARTIES

DANIEL E. O'CONNELL, Receiver
OSCAR NIPPER, Trustee of the Taurus Trust
SAM PENA
WILLIAM COOK

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OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and is set forth in Appendix A, *infra* at page 13. The decision of the United States District Court for the Southern District of Texas is unpublished and is set forth in Appendix B, *infra* at page 14. The decision of the United States Bankruptcy Court for the Southern District of Texas is set forth in Appendix C, *infra* at page 15.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit was entered on June 25, 1980. A Petition for rehearing was timely filed and was denied on August 13, 1980 (Appendix D). This Petition for certiorari was filed less than ninety (90) days from the date of the order denying rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

1. RULE 16 — FEDERAL RULES OF CIVIL PROCEDURE:

PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unneccessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for

consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

2. RULE 55 — FEDERAL RULES OF CIVIL PROCEDURE:

DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or an incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served

with written notice of the application for judgment at least 3 days prior to the hearing of such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

3. RULE 60 — FEDERAL RULES OF CIVIL PROCEDURE:

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission

may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis,

audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

DANIEL E. O'CONNELL, Receiver, hereinafter referred to as RECEIVER, filed this suit for an Arrangement pursuant to Chapter XI of the Bankruptcy Act, alleging certain acts of fraud on the part of Defendants to this suit and seeking to void a conveyance of real estate under 11 U.S.C. Sec. 110(e). Two of the Defendants, C.M. KRAUTHAMER and W.H. CANTRELL, had default judgments entered against them for failure to answer RECEIVER'S complaint. The Bankruptcy Court for the Southern District of Texas entered a pre-trial order directing all parties to file trial statements, and ordering that any party failing to do so would not be allowed to offer evidence at trial. Never having received notice of this order, Defendant OSCAR NIPPER, Trustee, hereinafter referred to as NIPPER, never filed a trial statement.

The trial commenced on February 10, 1976. NIPPER was present at the trial, but was not sitting at the counsel table and did not attempt to offer any evidence. On oral motion of RECEIVER's attorney, the Bankruptcy Court entered a default judgment against NIPPER on February 24, 1976, for failure to file a trial statement. A judgment was entered against Defendant SAM PENA, hereinafter referred to as PENA, on February 25, 1976. The trial continued against WILLIAM L. COOK, JR., hereinafter referred to as COOK, the sole remaining Defendant, which ended on April 28, 1976. On October 14, 1977, the Bankruptcy Court entered a take nothing judgment against COOK; pursuant to its earlier memorandum opinion dated July 21, 1977.

ON August 15, 1977, PENA filed a motion for relief from the judgment of February 25, 1976 and, on September 27, 1977, NIPPER filed a similar motion. A hearing on these motions was held on October 17 and they were both denied on order of June 8, 1978. NIPPER and PENA appealed this order to the United States District Court for the Southern District of Texas which affirmed the decision of the Bankruptcy Court by order of

January 4, 1979. NIPPER and PENA appealed this order to the United States Court of Appeals for the Fifth Circuit, which affirmed the lower Court decision by a per curiam opinion dated June 25, 1980.

REASONS FOR GRANTING THE WRIT

1. Entry of default judgment was too harsh a remedy for failure to comply with the Bankruptcy Court's pre-trial orders.

The Bankruptcy Court's pre-trial order directed that any party who failed to file a trial statement would be barred from offering any evidence at trial. NIPPER and PENA were never advised that their failure to file a trial statement would subject them to the possibility of having a default judgment entered against them. In fact, NIPPER has continually stated that he never even received notice of the Court's pre-trial order.

Rule 16 of the Federal Rules of Civil Procedure governs pre-trial procedures. The primary function of pre-trial proceedings is to provide for an orderly and expeditious disposition of cases. While the trial Court must have some means of enforcing its judgments, ". . . the ultimate sanction of dismissal should be utilized only in the face of conduct so reprehensible that no alternative sanction would protect the integrity of the pre-trial procedures contemplated by Rule 16." *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir., 1976); *Luis C Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 419 (1st Cir., 1976); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 914 (2nd Cir., 1959); *Von Poppenheim v. Portland Boxing & Wrestling Commission*, 442 F.2d 1047, 1053-54 (9th Cir., 1971), *certiorari denied*, 404 U.S. 1039.

There is nothing in the report to show that NIPPER and PENA were guilty of anything which can be labeled as reprehensible conduct. They did not systematically and continually refuse to comply with the Court's orders. Clearly, "the integrity

of the pre-trial procedures contemplated by Rule 16" could be preserved by imposing a less severe sanction. In fact, such a sanction was contemplated by the Bankruptcy Court in its initial order.[1] Consequently, the Bankruptcy Court abused its discretion by entering a default judgment against NIPPER and PENA solely for their failure to file trial statements.

2. The Bankruptcy Court failed to conform to the requirements of Rule 55 in entering the default judgments against PENA and NIPPER.

Rule 55(b)(2) of the Federal Rules of Civil Procedure states in pertinent part:

> "...If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with **written** notice of the application for judgment at least three days prior to the hearing on such application." (emphasis added)

It is undisputed that NIPPER and PENA both entered an appearance in the bankruptcy proceedings. Furthermore, it is undisputed that the motion to enter the default judgment was entered orally and was heard on the same day on which it was made. Consequently, the default judgments against NIPPER and PENA should be null and void since the provisions of Rule 55 were not complied with.

3. There is a basic conflict between the decisions of the 5th Circuit Court of Appeals in this case with the decisions of other Circuit Courts of Appeal in similar cases.

In *Frow v. De la Vega*, 82 U.S. 552 (1872), a joint conspiracy to defraud the appellee of a large tract of land in Texas was alleged. One defendant failed to answer in the case, and a decree pro confesso was taken against him. A final decree absolute was later entered against him, from which he appealed. The

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[1]The pre-trial order stated that the sanction for failure to comply would be a bar against adducing any evidence at trial.

remaining defendants appeared and answered and prevailed in a trial on the merits. This court then held that the complaint must be dismissed as to all defendants, including the one who had defaulted. *Frow* was cited in *Davis v. National Mortgage Corp.*, 349 F.2d 175 (2nd Cir., 1965), a case coming through the bankruptcy courts. The trustee in bankruptcy filed a complaint to avoid certain transactions alleging they were a fraud on creditors. One of the defendants failed to answer and a default judgment was entered against him. Subsequently, the trustee's complaint was dismissed, and the court held that since liability would have been joint, the dismissal disposed of the case against all the defendants, including the one who had defaulted. *Frow* was also cited in *United States ex. rel. Hudson v. Peerless Ins. Co.*, 374 F.2d 942 (4th Cir., 1967), where the court held that *Frow* doctrine should logically apply to joint and several liability. Logically, the case at the bar and those just cited cannot be distinguished, except as to their final disposition. Therefore, Petitioner requests this Court to decide this matter and establish a uniform rule throughout the United States.

4. The District Court below abused its discretion under Federal Rule 60(b) by failing to grant NIPPER and PENA relief from the default judgments entered against them.

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . or (6) any other reason justifying relief from the operation of judgment."

This honorable court has stated that:

> "(Fed. R. Civ. P.) 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of common law remedial tools. In simple English, the language of the :'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable

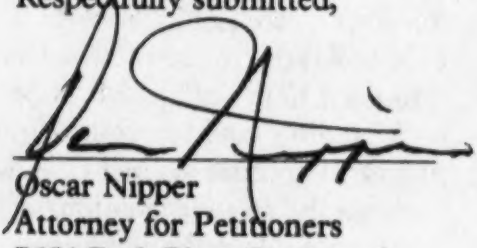
them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott v. United States,* 335 U.S. 601, 614-5 (1949).

As already noted, the Bankruptcy Court's pre-trial order stated that any party who did not file a trial statement would be barred from putting forth evidence at the trial on the merits. Under 11 U.S.C. Sec. 110(e), upon which the Reciever based his complaint, an actual existing creditor who receives an actual injury by the alleged fraudulent transfer must be shown or the Receiver's case fails. *Cameron v. Federal Auto Parts, Inc.,* 301 F.2d 867 (5th cir., 1962); *Rockmore V. Stallings,* 167 F.2d 204 (3rd Cir., 1948), aff'g 72 F.Supp. 172 (D.M.J., 1947). That no such creditor could be found is evidenced by the take nothing judgment entered against COOK. There can be no difference between the relative positions of PENA, COOK and NIPPER. Thus, to enforce the judgments against NIPPER and PENA would be unjust not only as to them, but also as to COOK who would effectively be losing whatever he initially gained in the bankruptcy proceedings below.

PRAYER

Upon consideration of Petitioners' argument, Petitioners pray for this honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to correct the abuses of discretion committed by the Court below, and the injustices which have been suffered to Petitioners herein.

Respectfully submitted,



Oscar Nipper
Attorney for Petitioners
7654 Park Place Boulevard
Houston, Texas 77087

Exhibit "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1242

In the Matter of: CHAMPIONS RACQUET CLUB ESTATES, INC., Debtor

SAM PENA & OSCAR NIPPER,
Trustee,

Appellants,

versus

DANIEL E. O'CONNELL,
Receiver,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(June 25, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir, 1970, 430 F.2d 966.

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF	x	CLERK,
CHAMPIONS RACQUET	x	U.S. DISTRICT COURT
CLUB ESTATES, INC.,	x	SOUTHERN DISTRICT
Debtor	x	OF TEXAS
	x	FILED
DANIEL E. O'CONNELL,	x	JAN 4 1979
RECEIVER,	x	
Plaintiff,	x	V. BAILEY THOMAS,
	x	CLERK
v.	x	BY DEPUTY:
	x	
SAM PENA,	x	CIVIL ACTION NO.
ET AL,	x	H-78-1077
Defendants	x	
	x	
	x	

ORDER

This case is before the court on appeal from a Bankruptcy Judge decision pursuant to Bankruptcy Rule 801. By order dated June 8, 1978, the Honorable Bankruptcy Judge John Blinn entered an order denying the motions for relief from judgment filed by Defendants Sam Pena and Oscar Nipper, Trustee (Defendants). Defendants appeal from such order. This court is of the opinion that Defendant's appeal has no merit, and therefore affirms the decision of the Bankruptcy Judge. It is

ORDERED that the decision of the Bankruptcy Judge denying motions for relief from judgment is hereby AFFIRMED.

DONE at Houston, Texas, this 4th day of January 1979.

United States District Judge
(Ross Sterling)

Exhibit "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF	x	
	x	
CHAMPIONS RACQUET	x	
CLUB ESTATES, INC.	x	BANKRUPTCY NO.
	x	73-HB-290
DEBTOR	x	
	x	
DANIEL E. O'CONNELL,	x	ADVERSARY A
RECEIVER	x	
	x	
Plaintiff	x	
	x	
v.	x	
	x	
SAM PENA, WILLIAM L.	x	
COOK, JR., C.M.	x	
KRAUTHAMER, OSCAR	x	
NIPPER, TRUSTEE, and	x	
W.H. CANTRELL, JR.	x	
	x	

Defendants

JUDGMENT

BE IT REMEMBERED that on the 10th day of February, 1976, the above styled and numbered cause was set for trial and all parties appearing with counsel announced ready and proceeded to trial before the Court.

Interlocutory default judgments having previously been entered against Defendants C.M. Krauthamer and W.H. Cantrell, Jr., Plaintiff moved for a default judgment against Oscar Nipper, Trustee, for failure to comply with the pretrial order which judgment was granted. Defendant Pena stated he had no defense to the Plaintiff's complaint. A judgment against

Defendant Sam Pena was entered. Evidence was presented by Receiver on February 10th and subsequent days in that week. The case was continued until April 26, 1976, when Defendant Cook presented his defense on that day and two subsequent days. Motions for Judgment were filed by Plaintiff and Defendant Cook which were heard at oral argument.

The Court after considering the pleadings, hearing the evidence, the argument and briefs of counsel is of the opinion that Plaintiff take nothing by way of his complaint against Defendant, William L. Cook, Jr.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff take nothing against Defendant, William L. Cook, Jr., and that all costs of Court are taxed against the Plaintiff for which let execution issue in the event same are not paid.

SIGNED this the 14th day of October, 1977.

United Stated Bankruptcy Judge
(John Blinn)

Exhibit "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1242

In the Matter of: CHAMPIONS RACQUET CLUB ESTATES, INC., Debtor

SAM PENA & OSCAR NIPPER, Trustee,
Appellants,

versus

DANIEL E. O'CONNELL, Receiver,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

(Unit A)

ON PETITION FOR REHEARING
(August 13, 1980)

Before GOLDBERG, GARZA, and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge
(Thomas Reauley)

I Oscar Nipper, a duly admitted member of the Bar of the Supreme Court of the United States, hereby advise that a true and correct copy of the foregoing Petition ofr Certiorari was deposited in the United States Mail addressed to the Clerk of the Supreme Court of the United States on the 19th day of September, 1980.

Oscar Nipper

Before me, the undersigned authority, personally appeared Oscar Nipper, and on his oath deposed and stated that he is the person whose name is subscribed to the foregoing motion and that the statements therein are true.

NOTARY PUBLIC
WALTER M. REAVES JR.
Notary Public, State of Texas
My Commission Expires, 4/07/84

CERTIFICATE OF SERVICE

On the 19th day of September, 1980, a true and correct copy of the above and foregoing instrument was mailed to the following persons by United States Certified Mail, return receipt requested, with sufficient postage thereon:

Mr. Paul Lawrence
711 Fannin No. 216
Houston, TX 77002
Certified No. 6108766

Mr. James Taylor
2100 West Loop South
Suite 727
Houston, TX 77002
Certified No. 6108768

Mr. Thad Grundy
2110 Tenneco Building
Houston, TX 77002
Certified No. 6108767

Oscar Nipper

JAN 15 1981

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-734

SAM PENA AND OSCAR NIPPER, Trustee,

Petitioners

VS.

DANIEL E. O'CONNELL, Receiver,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY OF RESPONDENT TO PETITION

THAD GRUNDY
3300 Two Allen Center
Houston, Texas 77002
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Of Counsel:

THAD T. HUTCHESON
HUTCHESON & GRUNDY
3300 Two Allen Center
Houston, Texas 77002

Bowne of Houston, Inc. Printed in U.S.A.

QUESTION PRESENTED

This is a controversy arising from a judgment of the Bankruptcy Court entered in an adversary proceeding in an arrangement case under Chapter XI of the Bankruptcy Act, pending in the Southern District of Texas, in favor of Daniel E. O'Connell, Receiver of the debtor and plaintiff in the adversary proceeding, and against Pena and Oscar Nipper, Trustee, defendants. The single question presented by the petition for writ of certiorari is whether the decision of the Bankruptcy Court, affirmed by the District Court and by the Court of Appeals for the Fifth Circuit, that Pena and Nipper, Trustee, were not entitled to relief from judgments granted in favor of the Receiver and against them in the adversary proceeding, on motions filed by them pursuant to Rule 60(b), F.R.Civ.P., constituted an abuse of discretion requiring reversal.

LIST OF INTERESTED PARTIES

Sam Pena

Oscar Nipper, Trustee of the Taurus Trust

William L. Cook, Jr.

Daniel E. O'Connell, Receiver of Champions Racquet Club Estates, Inc., Debtor

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RULES

Rule 60(b), F.R.Civ.P. 1

ADDITIONAL OPINIONS IN COURTS BELOW

Petitioners have selected certain orders and judgments relevant to this case for their Appendices, but have omitted the following:

1. Memorandum opinion on trustee's (*sic*) complaint, dated July 21, 1977.

2. Order denying motions for relief from judgment, dated June 8, 1978.

This opinion and this order were required to be included in the petition by Rule 21.1(k)(ii) of this Court, and both are material to the consideration of the petition. The memorandum opinion is set forth as Appendix A, pages . , and the order is set forth as Appendix B, pages . , *infra.*

RULE INVOLVED

Rule 60(b), Federal Rules of Civil Procedure:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not

more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

STATEMENT OF THE CASE

Petitioner's statement of the case is both incomplete and inaccurate. A complete statement follows.

This case was commenced by Respondent, Daniel E. O'Connell, Receiver of Champions Racquet Club Estates, Inc. ("Champions"), the debtor in an arrangement case under Chapter XI of the Bankruptcy Act pending in the Southern District of Texas, by filing in the arrangement case a complaint in an adversary proceeding against Pena, Nipper, Cook, Krauthamer, and Cantrell, seeking to recover certain real property allegedly fraudulently transferred to the Taurus Trust prior to the filing of the petition for an arrangement.

Pena, Krauthamer, and Cook caused the incorporation of Champions and were all the stockholders thereof; and they were and are beneficiaries of the Taurus Trust, of which Nipper is the Trustee. In 1971 Pena, Krauthamer, and Cook negotiated for the acquisition of 234 acres of land in Harris County, Texas, based upon financing by Center

Savings Association, which financing was guaranteed by another individual. At the closing, 210 acres of this land were conveyed to Champions, and the remaining 23.9 acres were conveyed to the Taurus Trust, without the knowledge of Center Savings Association or the guarantor. In 1973, Center Savings Association matured the debt and began foreclosure proceedings, and Champions filed the petition for an arrangement under Chapter XI on July 2, 1973. The property was sold at foreclosure, pursuant to Bankruptcy Court approval, and the proceeds were applied to the payment of secured debt.

The receiver then commenced the adversary proceeding, a portion of which is the subject of the petition in this case. Default judgments against Krauthamer and Cantrell were entered, from which they did not appeal. Prior to the trial of the remainder of the case against Pena, Nipper, and Cook, Pena and another individual acquired the stock of Cook and Krauthamer in Champions.

Nipper, an attorney, appeared in the Bankruptcy Court during the first day of the trial and stated to the Court that he was simply a fiduciary, and that he would not take an adversary position in the case. At that point, Cook was participating in the case, in person and by counsel. Krauthamer's interest in the property held by the Taurus Trust had been awarded to the Receiver in the default judgment which had become final. While Nipper was still present, the Court announced that the motion of the Receiver for judgment, based on Nipper's failure to file a trial statement, was granted. A final judgment against Nipper was entered on February 24, 1976, after conclusion of the Receiver's case, and notice thereof was given to Nipper.

Pena appeared at the trial in person and by his attorney, they were present during the trial, and Pena testified in support of the allegations of the Receiver's complaint. At

the conclusion of the Receiver's case, Pena stated to the Court that he had no defense to the allegations of the complaint, whereupon the Receiver moved for judgment against him. The Court called Pena to the witness stand and asked if he had consulted with his attorney and if he understood and agreed to the Receiver's motion. Pena having expressed his consent to the entry of a judgment against him, the Court granted the Receiver's motion for judgment. A judgment against Pena was entered on February 25, 1976, and notice thereof was given to Pena.

The trial of the case against Cook was thereafter completed, and the Court ruled adversely to the Receiver in its Memorandum Opinion dated July 21, 1977. Although the schedules filed by Champions reflected substantial debts, the Court found in its memorandum opinion that there were no creditors who would be benefited by a recovery by the Receiver against Cook, and that the benefits of such a recovery would go to the stockholders of Champions who were, at that time, Pena and his partner. The Court held that the defendants, including Cook, were guilty of a willful violation of their duty to Champions, resulting in a substantial diversion of corporate assets, but that the Receiver had failed to prove any injury to creditors and was therefore not entitled to relief. A final judgment against the Receiver and in favor of Cook was entered on October 14, 1977.

On August 25, 1977, Pena filed a motion for relief from the judgment of February 25, 1976, based upon Sections (5) and (6) of Rule 60(b), alleging two grounds: (1) lack of notice of the entry of the judgment; and (2) the judgment against Pena was inconsistent with the later judgment in favor of Cook. Nipper filed a similar motion on September 27, 1977. After a hearing, the motions were denied by the Bankruptcy Court, and Pena and Nipper filed a joint notice of appeal to the District Court. The District Court held that the appeal had no merit and affirmed the decision of

the Bankruptcy Court on January 4, 1979. Pena and Nipper appealed that decision to the Court of Appeals for the Fifth Circuit, which affirmed the decision, without opinion, on June 25, 1980.

REASONS FOR DENYING THE WRIT

1. *Reasons 1 and 2 asserted by Petitioners for granting the writ — entry of judgments by default and non-compliance with Rule 55 — were not raised in Petitioners' motions for relief under Rule 60(b) filed in the Bankruptcy Court.*

Copies of the motion for relief from judgment or order filed by Pena and the motion for relief from judgment filed by Nipper are set forth in Appendix C and Appendix D, respectively, at pages and , *infra.* The only grounds urged by Petitioners in those motions were lack of notice and inconsistency of the judgment rendered against them and the judgment rendered in favor of the remaining defendant, Cook. It cannot reasonably be suggested, particularly at the last stage of this long case, that the trial judge was guilty of an abuse of discretion in failing to grant relief to Petitioners on grounds which were never presented to him for decision. It appears to be settled that issues not pleaded or argued in the Courts below will not be considered in this Court. *Tennessee* v. *Dunlap,* 96 S.Ct. 2099, 2102 n. 3, 426 U.S. 312, 316 n. 3, 48 L.Ed.2d 660 (1976); *Miree* v. *DeKalb County,* 97 S.Ct. 2490, 2496, 431 U.S. 783, 788, 53 L.Ed.2d 594 (1977); *Dothard* v. *Rawlinson,* 97 S.Ct. 2720, 2724 n. 1, 423 U.S. 323, 53 L.Ed.2d 786 (1977).

2. *Reason 3 asserted by Petitioners for granting the writ — an alleged conflict between decisions of the Court of Appeals in this case and decisions in other Circuits — has no factual basis.*

While Petitioners do not explain how the cases cited by them are in conflict with the decision of the Court of

Appeals in this case, Respondent must assume that they are attempting to argue that those cases hold that inconsistency of judgments is a ground for relief under Rule 60(b). *Davis* v. *National Mortgage Corp.*, 349 F.2d 175 (2d Cir. 1965), involved a dismissal as to a defaulting defendant, in which the judgment of dismissal had not yet become final and appealable. *United States ex. rel. Hudson* v. *Peerless*, 374 F.2d 942 (4th Cir. 1967), involved default judgments against a single defendant, signed but not entered, which were therefore not final and appealable. Neither case involved motions for relief under Rule 60(b). In this case, the Receiver holds separate judgments against Pena and against Nipper, individually, directing each of them to convey to the Receiver his interests in the Taurus Trust and in the real property held by that Trust and made the subject of this litigation, which judgments became final and appealable in February 1976, long before the entry of the judgment against Cook, the remaining defendant, in October 1977.

3. *Reason 4 asserted by Petitioners for granting the writ — alleged abuse of discretion — is insufficient.*

Petitioners in their motions sought relief from the judgments against them under Sections (5) and (6) of Rule 60(b), and argued that lack of notice and inconsistency of judgments constituted sufficient grounds for relief under those Sections. The skeletal contention of abuse of discretion — a few short sentences at page 11 of Petitioners' brief — has no visible relation to the Rule which they invoked.

As to lack of notice, the Bankruptcy Court found as a fact that Pena and Nipper were present in Court at the time that the Receiver's motions for judgment against them were granted, and that notice of the entry of such judgments was

given to each of them. This ground was abandoned by Petitioners and has not been presented here.

As to inconsistency of the judgments, Petitioners are foreclosed by the decision of this Court in *Ackermann* v. *United States,* 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207 (1950), in which the Court held:

> "Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong.... There must be an end to litigation someday, and free, calculated and deliberate choices are not to be relieved from." 340 U.S. at 198.

Application of the ruling of *Ackermann* to the facts of this case mandates the result reached by the Bankruptcy Court on the motions for relief from judgment, and by the District Court and the Court of Appeals. Granting the motions of Nipper and Pena would have constituted an abuse of the discretion of the Bankruptcy Court.

CONCLUSION

Petitioners here rely upon issues which were not raised by them in the Bankruptcy Court; they have failed to establish a conflict between the decision of the Court of Appeals in this case and any decision of another Court of Appeals; they have failed to establish that "it is no longer equitable that the judgment should have prospective application" [R. 60(b)(5)] or "any other reason justifying relief from the operation of the judgment" [R. 60(b)(6)]; and disposition of this case is controlled by a prior decision of this Court. The writ should be denied.

.....

THAD GRUNDY
Attorney for
Daniel E. O'Connell,
Receiver of
Champions Racquet Club
Estates, Inc., Respondent

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APPENDIX A

In The

United States District Court

For The Southern District of Texas

Houston Division

In the Matter of Champions Racquet Club Estates, Inc., Debtor Daniel E. O'Connell, Receiver *Plaintiff*	Bankruptcy No. 73-HB-290
v. Sam Pena, William L. Cook, Jr., C. M. Krauthamer, Oscar Nipper, Trustee, and W. H. Cantrell, Jr. *Defendants*	Adversary A

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MEMORANDUM OPINION ON TRUSTEE'S COMPLAINT

The question presented in this adversary proceeding is whether the Receiver may now recover for the estate assets allegedly misappropriated from the debtor by a party either through his capacity as a fiduciary for or through his control of the debtor corporation.

In early 1971 Sam Pena, William L. Cook, Jr. and C. M. Krauthamer began negotiating to acquire approximately 234 acres in northwest Harris County, Texas. Their purpose was to develop a residential subdivision, in which business each of them had varying degrees of experience. A series of earnest money contracts was executed by the then owners of the property, Mr. R. T. Marshall and Dr. Leslie Lemak (each of whom owned approximately 117 acres) and Mr. William Braden as "Trustee" for various persons or Champions Racquet Club Estates, Inc. Financing through Center Savings & Loan Association was arranged with the corporation as borrower conditioned on a personal guarantee by an individual of satisfactory substance. Arrangements were made through an intermediary with Mr. W. T. Duncan, who agreed to personally guarantee the loan in consideration for his election as President of the corporation, his acquisition of controlling interest in the stock of the corporation and receipt of a cash payment.

The transaction was then closed on December 23, 1971. At closing Dr. Lemak conveyed his entire tract of 117 acres to the corporation but Mr. Marshall conveyed only 92.9348 acres. The balance of the Marshall property, 23.9657 or approximately 24 acres, was conveyed to Oscar Nipper, Trustee for the Taurus Trust, of which Cook, Pena and Krauthamer were and are the beneficiaries. *At no time prior to the closing of the Center loan were either Mr.*

Duncan or Center advised Mr. Marshall was conveying property in addition to the 92.9348 acres conveyed to the corporation.

For various reasons Center matured the obligation and posted the property for foreclosure. As a result the corporation filed a petition under Chapter XI on July 2, 1973. During the proceeding the Court authorized Center to proceed with foreclosure and at the sale Center, as the highest bidder, bought in the property for some $300,000 in excess of its accrued and unpaid obligations. The balance was then used to satisfy valid subordinate liens and obligations.

Daniel E. O'Connell was appointed Receiver of the debtor's estate and on May 2, 1974 filed a complaint against Messrs. Pena, Cook, Krauthamer, Cantrell (an individual with various involvements with the transaction) and Nipper, Trustee. Messrs. Cook and Nipper answered, but Messrs. Krauthamer and Cantrell did not. Mr. Pena filed a special appearance and objected to the jurisdiction of the Court.

The Receiver sought an interlocutory default judgment against Messrs. Krauthamer and Cantrell, which was granted on July 11, 1974. Messrs. Krauthamer and Cantrell moved to set aside the default judgments, which motions were denied on Oct. 24, 1975, after arguments and the filing of briefs by the parties. Several pre-trials were held and the matter was set for trial on Feb. 10, 1976.

After the case was called by the Court on February 10, the Receiver made an oral motion for a default judgment against Nipper, Trustee, for failure to comply with the pretrial order which judgment was entered. Also on Feb. 10, Messrs. Pena and Cook withdrew their objections to the jurisdiction of the Court; Mr. Pena further stated he had no defense to the allegations of the complaint. After hearing testimony, the Court entered a judgment against Pena.

The balance of the day of February 10 and subsequent days in that week were consumed by the presentation of the Receiver's case. The Court then continued the presentation of Mr. Cook's defense until April 22 and on that day and two subsequent days, Mr. Cook presented his defense. The Receiver and Mr. Cook later filed motions for judgment and briefs which were heard at oral argument.

One may best understand both the essence of the Receiver's legal theories and the duty he evidently feels bound to enforce through the following quote:

> Their [corporate directors and stockholders] dealings are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Company,* 245 U.S. 590, 599, 41 S.Ct. 209, 212, 65 L.Ed. 425. The essence of the test is whether or not under all circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interest in the corporation — creditors as well as stockholders. *Pepper* v. *Litton,* 308 U.S. 295, 306, 307 (1939)

The Receiver presents his case through three alternative theories. First, he argues Cook owed a fiduciary duty to the corporation and as such must demonstrate the fairness of his dealings with the corporation. Second, the Receiver alleges the transfer was fraudulent as to existing creditors under Texas Business and Commerce Code Section 24.03 because no consideration was given at the time of the trans-

fer and at that time the debtor did not have in the State of Texas sufficient property subject to execution to satisfy its debts. Third, the Receiver argues the transfer is void because it was intended to delay, hinder or defraud creditors.

To this Cook has several responses. First, he claims he never was a fiduciary since he never was a stockholder or director before the closing and as of the closing Duncan became the controlling stockholder and director. Second, Cook argues the Receiver has failed to establish any other relationship through which Cook became a fiduciary. Third, he argues the Receiver has failed to establish the elements of his case; hence Cook has no burden to establish the fairness of the transaction. Thus Cook's arguments in the main are directed at the Receiver's first theory.

The evidence presented by Cook was apparently in mitigation of the seriousness of the resulting transaction. For example, he points out although Center never learned of the additional acreage until after the transaction was closed, neither did it ever voice concern or an objection to the transaction or its collateral position and in fact at foreclosure bid substantially in excess of its debt. Likewise, Mr. Duncan with a most vital interest in the transaction expressly denied both the inadequacy of the collateral position of Center as well as any thoughts of being misled. Additionally, the evidence clearly demonstrated the property conveyed to the Taurus Trust, since not contiguous to the principal tracts, was of far less value and questionable utility to the original plan of development. But such evidence considered at its best does not pass muster when scrutinized.*

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* Viewed in the aggregate the evidence may even establish – although not plead by the Receiver and hence considered only in passing – total diversion of assets far in excess of the Taurus Trust assets. *Lunsford* v. *Haynie*, 175 F.2d 603 (5th Cir. 1949).

First, this Court — notwithstanding Cook was neither a director nor stockholder at the time of the transaction — believes he was most obviously a "control" person and a promoter in and for the corporation and as such a fiduciary relationship would attach. *McCandless* v. *Furland,* 296 U.S. 41 (1935); *Blanchard* v. *Commonwealth Oil Co.,* 294 F.2d 834 (5th Cir. 1961); and *Post* v. *U.S.,* 407 F.2d 219 (D.C. Cir. 1968). Second, such burden as the Receiver may initially have had has been adequately discharged and the burden has therefore shifted to Cook to demonstrate the fairness of the transaction. *Pepper* v. *Litton, supra; International Bankers Life Ins. Co.* v. *Holloway,* 368 S.W 2.d 567 (Tex. 1963); *Huffington* v. *Upchurch,* 532 S.W.2d 576 (Tex. 1976 — reh. denied). Third, as preliminarily indicated above, the evidence presented by Cook at best only mitigated the effect of the transaction; it did not discharge the required burden. However, the Court is not prepared to enter a judgment for the Receiver without adequate analysis of the following point.

Discovery in this matter was voluminous and apparently exhaustive, consuming as it did almost two years. Development and presentation of the respective positions of the Receiver and Cook, both at trial and post-trial through briefs, was excellent. Notwithstanding such preparation, there was no evidence of meaningful creditors who would be benefitted should the Receiver prevail under any of his theories. Thus this litigation, if successful, will result in a recovery for the defendants (as stockholders and/or creditors) of the very assets they are alleged to have misappropriated *less* substantial expenses incurred in costs of litigation. In the recent case of *Canion* v. *Texas Cycle Supply, Inc.,* 537 S.W.2d 510 (Tex. Civ. App. — Austin 1976 writ ref. n.r.e.) the court examined an analogous situation and candidly observed:

> We have some difficulty in understanding how an officer and director of a corporation, who is its sole shareholder, may appropriate a corporate opportunity of his solely owned corporation.

537 S.W.2d at 511.

Thus what has been established is a technical breach without evidence of injury to third parties. Cook notes this very problem and in particular cites a portion of *McCandless* v. *Furland*, 296 U.S. 41 (1935) in which on a somewhat similar yet far more intricate set of facts the Supreme Court observed:

> This is not a case where at the time of issuing the securities the shareholders and the promoters were the only ones concerned.

296 U.S. at 160.

Cook suggests the Court is thereby indicating the result (enforcing a fiduciary duty) would be different in a case such as that at bar where Center — the sole creditor after the closing — suffered no injury. In so suggesting Cook is highlighting the crux of the problem: the Receiver has established a duty and a wilful violation of that duty resulting in a substantial diversion of corporate assets but has not proven nor even suggested who or what was thereby injured. Absent such injury this Court can grant no more than a take-nothing judgment for the Receiver on this theory of recovery.

The Receiver also argues the transfer was fraudulent *as to existing creditors* under Texas Business and Commerce Code Section 24.03 for reasons set forth above but this argument fails at the outset for failure of proof of

existing creditors other than Center.* In the alternative the Receiver argues the transfer is void under Texas Business and Commerce Code Section 24.02 because intended to delay, hinder or defraud creditors. The Receiver well briefs this point of law but again the Court is unable to find as a fact a creditor (other than Center) either then existing or subsequently arising who — assuming the requisite intent — was injured. Counsel for Cook is therefore directed to prepare within five days of the date of this Memorandum an appropriate order for entry.

Rendered at Houston in said District on the 21st day of July, 1977.

. . . . . .

United States Bankruptcy Judge

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* Some proof was indeed offered but it was less than conclusive.

APPENDIX B

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF CHAMPION RACQUET CLUB ESTATES, INC., DEBTOR CHAMPION RACQUET CLUB ESTATES, INC. AND DANIEL E. O'CONNELL, RECEIVER *Plaintiffs*	PROCEEDINGS No. 73-HB-290
v.	
SAM PENA, WILLIAM L. COOK, JR., C. M. KRAUTHAMER, OSCAR NIPPER, TRUSTEE, and W. H. CANTRELL, JR. *Defendants*	ADVERSARY A

ORDER DENYING MOTIONS FOR RELIEF FROM JUDGMENT

At Houston, in said District, on the 8th day of June, 1978, came on to be heard the Motions for Relief from Judgment under F.R.C.P. 60(b) filed herein by Messrs. Sam Pena and Oscar Nipper, Trustee, alleging judgments entered against them in February 1976 should be set aside for (1) lack of notice of entry of judgment and (2) inequitable enforcement of inconsistent judgment, and the Court having considered the Motions, the entire record of this case and arguments of counsel, upon the request of the parties makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On May 2, 1974, Daniel E. O'Connell, Receiver in the above proceeding, filed a complaint against Sam Pena, William L. Cook, Jr., C. M. Krauthamer, Oscar Nipper, Trustee and W. H. Cantrell, Jr. seeking to recover certain real property.

2. On September 10, 1975, the Court entered a pre-trial order directing all parties to file trial statements and ordering that any party failing to do so would not be allowed to offer evidence at trial.

3. Oscar Nipper, Trustee, did not file a trial statement.

4. Trial commenced on February 10, 1975. Sam Pena appeared personally and was represented by counsel. After trial had commenced but during the first day of trial, Oscar Nipper appeared *pro se.*

5. On the first day of trial, the Receiver made an oral motion for entry of judgment against Nipper by reason of his failure to file a trial statement. When Mr. Nipper appeared in the courtroom, such motion was taken up and after hearing from Nipper and from the Receiver, the Court granted said motion for judgment.

6. On February 24, 1976, the Court entered judgment against Oscar Nipper, Trustee. Notice of the entry of such judgment was given to Mr. Nipper, as reflected in the records of the court.

7. At the conclusion of the Receiver's presentation of his case, Sam Pena stated in open court that he had no defense to the allegations of the complaint. The Receiver then made an oral motion for judgment against Pena. The Court called Mr. Pena to the stand and asked if he had consulted with his attorney and if he understood and agreed to the Receiver's motion. Mr. Pena having expressed his consent

to entry of such judgment against him, the Court granted the Receiver's motion.

8. On February 25, 1976, the Court entered judgment against Sam Pena. Notice of the entry of such judgment was given to Mr. Pena, as reflected on the judgment.

9. Trial of the case against William L. Cook, Jr., the sole remaining defendant, was concluded on April 28, 1976.

10. On July 21, 1977, the Court issued a Memorandum Opinion in which it found facts relevant to the transactions complained of by the Receiver and to the acts of all of the defendants with respect to the issues raised by the parties. Copies of this opinion were mailed to every party to the adversary proceeding. The Memorandum Opinion is incorporated herein by reference in its entirety.

11. On August 15, 1977, Pena filed a motion for relief from judgment, asking the Court set aside the judgment entered February 25, 1976, under the provisions of F.R.C.P. 60(b).

12. On September 27, 1977, Mr. Nipper filed a motion for relief from judgment asking the Court set aside the judgment entered February 24, 1976, under the provisions of F.R.C.P. 60(b).

13. A judgment pursuant to the Memorandum Opinion that the Receiver take nothing by way of his complaint against Cook was entered on October 14, 1977. This judgment was approved as to form by all parties to the adversary proceeding.

14. After notice, the Motions for Relief from Judgment were brought on for hearing on October 17, 1977, at which hearing counsel presented argument in support of and in opposition to the Motions. No evidence was presented by any party.

CONCLUSIONS OF LAW

Mr. Pena and Mr. Nipper allege in their Motions that neither of them was aware of the entry of these judgments until eighteen months after entry and indicate they would have taken an appeal from these judgments had they been aware of their entry. Assuming *arguendo* these allegations are true, lack of notice of entry of judgment without more does not authorize the Court to relieve a party from the consequences of failure to appeal within the time allowed. Bankruptcy Rule 922; *In re Morrow,* 502 F.2d 520 (5th Cir. 1974). While it is possible Mr. Pena and Mr. Nipper did not *receive* written notice of entry of judgment against them, they had actual notice of the intention of the Court to enter judgment and the court records indicate written notice of entry of judgment was sent. Mailing of notice is sufficient for all purposes for which notice of entry of an order is required by the Federal Rules and this concept is adopted by the Bankruptcy Rules. *Howard* v. *Local 74, Wood, Wire & Metal Lathers Int'l,* 208 F.2d 930 (7th Cir. 1953); 12 Wright & Miller, *Federal Practice and Procedure* § 3084 (1973); 13 *Collier on Bankruptcy* ¶ 922.03 (14th ed. 1977).

Movants also rely upon the equitable provisions of F.R.C.P. 60(b)(5) and (6). The provisions of Rule 60(b)(5) are not to be used as a substitute for an appeal or as a method of reopening litigation of issues previously disposed of by judgment. 11 Wright & Miller, *Federal Practice and Procedure* § 2863 (1973). There must be changed conditions which make continued enforcement of the judgment inequitable. *Blanchard* v. *St. Paul Fire and Marine Insurance Co.,* 341 F.2d 351 (5th Cir. 1965). Movants seem to believe changed conditions were created when this court rendered a take-nothing judgment in favor of the Receiver and against Mr. Cook, a co-defendant who presented and prose-

cuted a vigorous defense against the Receiver's allegations. Mr. Pena's attorney stated in hearing on the Motions that movants were not aware they had a proper defense until they had received the Court's opinion. Movants' discovery of a legal theory two years after trial on which they *could* have presented a defense cannot constitute the "changed conditions" contemplated by F.R.C.P. 60(b)(5).

Movants urge this Court to relieve them from the judgments under F.R.C.P. 60(b)(6). As stated in 11 Wright & Miller, *Federal Practice and Procedure* § 2864:

> The broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests. In particular, it ordinarily is not permissible to use this motion to remedy a failure to take an appeal.

Mr. Nipper and Mr. Pena made such a "free, calculated and deliberate choice" two years ago when they chose not to defend against the Receiver's complaint. They may not now invoke this rule to avoid the consequences of that notice. Commenting on the purpose of Rule 60(b)(6), the Supreme Court in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950) said:

> ... there must be an end to litigation someday, and free, calculated and deliberate choices are not to be relieved from."

For like reason, whether the take-nothing judgment is inconsistent with the judgments against Mr. Pena and Mr. Nipper is immaterial. Mr. Nipper and Mr. Pena had their "day in court", made their choices, no doubt after careful consideration of the consequences, and may not now belatedly conclude they should have decided otherwise.

The motions for Relief from Judgment against Mr. Nipper and Mr. Pena are accordingly in all things denied. SO ORDERED.

.....

United States Bankruptcy Judge

APPENDIX C

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF CHAMPION RACQUET CLUB ESTATES, INC., DEBTOR DANIEL E. O'CONNELL, RECEIVER *Plaintiff* v. SAM PENA, WILLIAM L. COOK, JR., C. M. KRAUTHAMER, OSCAR NIPPER, TRUSTEE, and W. H. CANTRELL, JR. *Defendants*	BANKRUPTCY No. 73-HB-290

MOTION FOR RELIEF FROM JUDGMENT

To The Honorable Judge of said Court:

COMES NOW SAM PENA, one of the Defendants, in the above styled and numbered cause, and respectfully moves this Court to set aside its Judgment, or Order directing turn-over of property to Receiver, entered February 25, 1976, and for good cause therefor would show the following:

I.

This Motion is brought pursuant to Rule 60 (b), 28 U.S.C.A. Fed. Rules. Civ. Proc. Your Movant would show the applicability of Sections (5) and (6).

II.

The Judgment or Order complained about attached hereto as exhibit "A" appears to be a Final Judgment as to the rights and ownership of your Movant in real estate described in and attached to said Order. That Judgment or Order does not contain any evidence that your Movant or his previous attorney RICHARD STRAHAN, knew of the formal entry of such Order. To the contrary, your Movant denies knowing about the formal entry of such Order until August, 1977.

III.

The property in question is held in trust for your Movant and Trustees therefore have not conveyed this property. Therefore, reconsideration of this matter will not prejudice the rights of the Plaintiffs herein. Plaintiffs have made no demand or effort to levy execution on that Order.

IV.

Further, your Plaintiffs' rights and interest in that property was no different from that of the other Defendants, more particularly WILLIAM L. COOK, JR. Said Defendant, COOK, had an identical legal interest in the said property.

V.

Thereafter, this Court considered the interest of the Defendant, WILLIAM L. COOK, in its memorandum opinion on Trustee's Complaint attached hereto as exhibit "B". Said memorandum opinion, obviously, correctly analyzes the legal interests of all of these parties. However, the entry of a Judgment against your Movant is inconsistent with this Court's reasoned decision as related to the rights of the Defendant COOK. For that reason equitable relief is appropriate for consistency of opinion as

well as for consistency of result. Your Movant should not be divested of his interest in said real estate and reconsideration by this Court is appropriate pursuant to Rule 60 (b).

VI.

Rule 60 (b) provides in part that this Court "may relieve a party or his legal representative from a Final Judgment, Order, or proceeding for the following reasons" . . . (5) *the Judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the Judgment should have prospective application;* or (6) *Any other reason justifying relief from the operation of the Judgment.* (emphasis added).

VII.

No party has sought enforcement of the Judgment or Order in question so no parties' position would be adversely affected by the reconsideration at this time. Conversely, your Movant's lack of notice of entry of Judgment adversely affected his right of appeal therefrom. Further, your Movant would have taken his statutory right of appeal pursuant to the rules regarding such appeals, if he had known of the entry of the Order complained about. For that reason equitable reconsideration pursuant to Rule 60 (b) is appropriate.

VIII.

Further, your Movant would re-urge Defendant COOK'S memorandum in support of COOK's Judgment. The same arguments, theories of recovery and conclusions, apply to your Movant.

WHEREFORE, PREMISES CONSIDERED, your Movant prays that after just trial or hearing hereon, that

Judgment be rendered setting aside the Judgment or Order directing turn-over of property to Receiver, as previously entered, that Judgment be entered for your Movant, PENA, in conformity with the Judgment for entry with respect to the Defendant, COOK, that costs of court previously assessed against Defendant PENA, be taxed against the Plaintiffs, that PENA recover all his right, title and interest to the property in dispute, and/or that separate Judgment be entered for PENA that is consistent with the Judgment rendered for Defendant COOK, and for such other and further relief, at law and in equity, to which your Movant may show himself justly entitled, and for which he will ever pray.

Respectfully submitted,
DOHERTY, VELA, POSER & COLLINS

By .....
LARRY J. DOHERTY

By ....., Clerk

Of Counsel:

DOHERTY, VELA, POSER & COLLINS
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FIAT

HEARING on the above Motion is set for the ..... day of ....., 1977, in the Court of the United States Bankruptcy Judge JOHN R. BLINN.

.....

JOHN R. BLINN
Judge Presiding

CERTIFICATE OF SERVICE

I, LARRY J. DOHERTY, do hereby certify that a copy of the above and foregoing Motion for Relief from Judgment or Order, was mailed, Certified Mail, Return Receipt Requested, to the attorneys below named:

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.....
LARRY J. DOHERTY

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF CHAMPIONS RACQUET CLUB ESTATES, INC., DEBTOR DANIEL E. O'CONNELL, RECEIVER *Plaintiff*	BANKRUPTCY No. 73-HB-290
V. SAM PENA, WILLIAM L. COOK, JR., C. M. KRAUTHAMER, OSCAR NIPPER, TRUSTEE, and W. H. CANTRELL, JR. *Defendants*	ADVERSARY A

JUDGMENT

Be it Remembered that

On the 10th day of February, 1976, the above styled and numbered cause was set for trial and all parties appearing with counsel announced ready and proceeded to trial before the Court.

Interlocutory default judgments having previously been entered against Defendants C. M. Krauthamer and W. H. Cantrell, Jr., Plaintiff moved for a default judgment against Oscar Nipper, Trustee, for failure to comply with the pretrial order which Judgment was granted. Defendant Pena stated he had no defense to the Plaintiff's complaint. A Judgment against Defendant Sam Pena was entered. Evidence was presented by Receiver on February 10th and

subsequent days in that week. The case was continued until April 26, 1976, when Defendant Cook presented his defense on that day and two subsequent days. Motions for Judgment were filed by Plaintiff and Defendant Cook which were heard at oral argument.

The Court after considering the pleadings, hearing the evidence, the argument and briefs of counsel is of the opinion that Plaintiff take nothing by way of his complaint against Defendant, William L. Cook, Jr.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff take nothing against Defendant, William L. Cook, Jr., and that all costs of Court are taxed against the Plaintiff for which let execution issue in the event same are not paid.

Signed this the .... day of ....., 1977.

.....
United States Bankruptcy Judge

APPROVED:

.....
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.....
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"EXHIBIT A-2"

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"EXHIBIT A-3"

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF CHAMPIONS RACQUET CLUB ESTATES, INC., DEBTOR DANIEL E. O'CONNELL, RECEIVER *Plaintiff*	BANKRUPTCY No. 73-HB-290
v.	
SAM PENA, WILLIAM L. COOK, JR., C. M. KRAUTHAMER, OSCAR NIPPER, TRUSTEE, and W. H. CANTRELL, JR. *Defendants*	ADVERSARY A

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MEMORANDUM OPINION ON TRUSTEE'S COMPLAINT

The question presented in this adversary proceeding is whether the Receiver may now recover for the estate assets

allegedly misappropriated from the debtor by a party either through his capacity as a fiduciary for or through his control of the debtor corporation.

In early 1971 Sam Pena, William L. Cook, Jr. and C. M. Krauthamer began negotiating to acquire approximately 234 acres in northwest Harris County, Texas. Their purpose was to develop a residential subdivision, in which business each of them had varying degrees of experience. A series of earnest money contracts was executed by the then owners of the property, Mr. R. T. Marshall and Dr. Leslie Lemak (each of whom owned approximately 117 acres) and Mr. William Braden as "Trustee" for various persons or Champions Racquet Club Estates, Inc. Financing through Center Savings & Loan Association was arranged with the corporation as borrower conditioned on a personal guarantee by an individual of satisfactory substance. Arrangements were made through an intermediary with Mr. W. T. Duncan, who agreed to personally guarantee the loan in consideration for his election as President of the corporation, his acquisition of controlling interest in the stock of the corporation and receipt of a cash payment.

The transaction was then closed on December 23, 1971. At closing Dr. Lemak conveyed his entire tract of 117 acres to the corporation but Mr. Marshall conveyed only 92.9348 acres. The balance of the Marshall property, 23.9657 or approximately 24 acres, was conveyed to Oscar Nipper, Trustee for the Taurus Trust, of which Cook, Pena and Krauthamer were and are the beneficiaries. *At no time prior to the closing of the Center loan were either Mr. Duncan or Center advised Mr. Marshall was conveying property in addition to the 92.9348 acres conveyed to the corporation.*

For various reasons Center matured the obligation and posted the property for foreclosure. As a result the cor-

poration filed a petition under Chapter XI on July 2, 1973. During the proceeding the Court authorized Center to proceed with foreclosure and at the sale Center, as the highest bidder, bought in the property for some $300,000 in excess of its accrued and unpaid obligations. The balance was then used to satisfy valid subordinate liens and obligations.

Daniel E. O'Connell was appointed Receiver of the debtor's estate and on May 2, 1974 filed a complaint against Messrs. Pena, Cook, Krauthamer, Cantrell (an individual with various involvements with the transaction) and Nipper, Trustee. Messrs. Cook and Nipper answered, but Messrs. Krauthamer and Cantrell did not. Mr. Pena filed a special appearance and objected to the jurisdiction of the Court.

The Receiver sought an interlocutory default judgment against Messrs. Krauthamer and Cantrell, which was granted on July 11, 1974. Messrs. Krauthamer and Cantrell moved to set aside the default judgments, which motions were denied on Oct. 24, 1975, after arguments and the filing of briefs by the parties. Several pre-trials were held and the matter was set for trial on Feb. 10, 1976.

After the case was called by the Court on February 10, the Receiver made an oral motion for a default judgment against Nipper, Trustee, for failure to comply with the pre-trial order which judgment was entered. *Also on Feb. 10, Messrs. Pena and Cook withdrew their objections to the jurisdiction of the Court; Mr. Pena further stated he had no defense to the allegations of the complaint. After hearing testimony,* the Court entered a judgment against Pena. The balance of the day of February 10 and subsequent days in that week were consumed by the presentation of the Receiver's case. The Court then continued the

presentation of Mr. Cook's defense until April 22 and on that day and two subsequent days, Mr. Cook presented his defense. The Receiver and Mr. Cook later filed motions for judgment and briefs which were heard at oral argument.

One may best understand both the essence of the Receiver's legal theories and the duty he evidently feels bound to enforce through the following quote:

> Their [corporate directors and stockholders] dealings are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Company*, 245 US 590, 599, 41 S.Ct. 209, 212, 65 L.Ed. 425. The essence of the test is whether or not under all circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interest in the corporation — creditors as well as stockholders.
>
> *Pepper* v. *Litton*, 308 US 295, 306, 307 (1939)

The Receiver presents his case through three alternative theories. First, he argues Cook owed a fiduciary duty to the corporation and as such must demonstrate the fairness of his dealings with the corporation. Second, the Receiver alleges the transfer was fraudulent as to existing creditors under Texas Business and Commerce Code Section 24.03 because no consideration was given at the time of the transfer and at that time the debtor did not have in the State of Texas sufficient property subject to execution to satisfy

its debts. Third, the Receiver argues the transfer is void because it was intended to delay, hinder or defraud creditors.

To this Cook has several responses. First, he claims he never was a fiduciary since he never was a stockholder or director before the closing and as of the closing Duncan became the controlling stockholder and director. Second, Cook argues the Receiver has failed to establish any other relationship through which Cook became a fiduciary. Third, he argues the Receiver has failed to establish the elements of his case; hence Cook has no burden to establish the fairness of the transaction. Thus Cook's arguments in the main are directed at the Receiver's first theory.

The evidence presented by Cook was apparently in mitigation of the seriousness of the resulting transaction. For example, he points out although Center never learned of the additional acreage until after the transaction was closed, neither did it ever voice concern or an objection to the transaction or its collateral position and in fact at foreclosure bid substantially in excess of its debt. Likewise, Mr. Duncan with a most vital interest in the transaction expressly denied both the inadequacy of the collateral position of Center as well as any thoughts of being misled. Additionally, the evidence clearly demonstrated the property conveyed to the Taurus Trust, since not contiguous to the principal tracts, was of far less value and questionable utility to the original plan of development. But such evidence considered at its best does not pass muster when scrutinized.*

First, this Court — notwithstanding Cook was neither a director nor stockholder at the time of the transaction —

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* Viewed in the aggregate the evidence may even establish — although not plead by the Receiver and hence considered only in passing — total diversion of assets far in excess of the Taurus Trust assets. *Lunsford* v. *Haynie*, 175 F.2d 603 (5th Cir. 1949).

believes he was most obviously a "control" person and a promoter in and for the corporation and as such a fiduciary relationship would attach. *McCandless* v. *Furland*, 296 U.S. 41 (1935); *Blanchard* v. *Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir. 1961); and *Post* v. *U.S.*, 407 F.2d 219 (D.C. Cir. 1968). Second, such burden as the Receiver may initially have had has been adequately discharged and the burden has therefore shifted to Cook to demonstrate the fairness of the transaction. *Pepper* v. *Litton, supra; International Bankers Life Ins. Co.* v. *Holloway*, 368 S.W.2d 567 (Tex. 1963); *Huffington* v. *Upchurch*, 532 S.W.2d 576 (Tex. 1976 — reh. denied). Third, as preliminarily indicated above, the evidence presented by Cook at best only mitigated the effect of the transaction; it did not discharge the required burden. However, the Court is not prepared to enter a judgment for the Receiver without adequate analysis of the following point.

Discovery in this matter was voluminous and apparently exhaustive, consuming as it did almost two years. Development and presentation of the respective positions of the Receiver and Cook, both at trial and post-trial through briefs, was excellent. Notwithstanding such preparation, there was no evidence of meaningful creditors who would be benefitted should the Receiver prevail under any of his theories. Thus this litigation, if successful, will result in a recovery for the defendants (as stockholders and/or creditors) of the very assets they are alleged to have misappropriated *less* substantial expenses incurred in costs of litigation. In the recent case of *Canion v. Texas Cycle Supply, Inc.*, 537 S.W.2d 510 (Tex.Civ. App. — Austin 1976 writ ref.n.r.e.) the court examined an analogous situation and candidly observed:

> We have some difficulty in understanding how an officer and director of a corporation, who is its sole shareholder, may appropriate a corporate opportunity of his solely owned corporation.

537 S.W.2d at 511.

"EXHIBIT B-6"

Thus what has been established is a technical breach without evidence of injury to third parties. Cook notes this very problem and in particular cites a portion of *McCandless* v. *Furland,* 296 U.S. 41 (1935) in which on a somewhat similar yet for more intricate set of facts the Supreme Court observed:

> This is not a case where at the time of issuing the securities the shareholders and the promoters were the only ones concerned.

296 U.S. at 160.

Cook suggests the Court is thereby indicating the result (enforcing a fiduciary duty) would be different in a case such as that at bar where Center — the sole creditor after the closing — suffered no injury. In so suggesting Cook is highlighting the crux of the problem: the Receiver has established a duty and a wilful violation of that duty resulting in a substantial diversion of corporate assets but has not proven nor even suggested who or what was thereby injured. Absent such injury this Court can grant no more than a take-nothing judgment for the Receiver on this theory of recovery.

The Receiver also argues the transfer was fraudulent *as to existing creditors* under Texas Business and Commerce Code Section 24.03 for reasons set forth above but this argument fails at the outset for failure of proof of existing creditors other than Center.* In the alternative the Receiver argues the transfer is void under Texas Business and Commerce Code Section 24.02 because intended to delay, hinder or defraud creditors. The Receiver well briefs this point of law but again the Court is unable to find as a fact a creditor (other than Center) either then existing or subsequently arising who — assuming the requisite intent — was

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* Some proof was indeed offered but it was less than conclusive.

injured. Counsel for Cook is therefore directed to prepare within five days of the date of this Memorandum an appropriate order for entry.

Rendered at Houston in said District on the 21st day of July, 1977.

United States Bankruptcy Judge

"EXHIBIT B-8"

APPENDIX D

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF CHAMPION RACQUET CLUB ESTATES, INC. DEBTOR AND DANIEL E. O'CONNELL, RECEIVER *Plaintiff* VS. SAM PENA, WILLIAM L. COOK, JR., C. M. KRAUTHAMER, OSCAR NIPPER, TRUSTEE, AND W. H. CANTRELL, JR., *Defendants*	BANKRUPTCY No. 73-HB-290

MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW OSCAR NIPPER, Trustee for the Taurus Trust, one of the Defendants, in the above styled and numbered cause, and respectfully moves this Court to set aside its Judgement, or Order directing turn-over of property to Receiver, entered February 25, 1976, and for good cause therefore would show the following:

I.

This Motion is brought pursuant to Rule 60(b), 28 U.S.C.A. Fed. Rules, Civ. Proc. Your movant would show the applicability of Sections (5) and (6).

II.

Movant would show that the sole remaining beneficiary of the Taurus Trust is SAM PENA, who has also filed a

motion for relief under this same judgement. The Movant hereby incorporates by reference each and every allegation contained in the Motion For Relief From Judgement or Order filed by the Co-Defendant SAM PENA. The relief requested in the incorporated motion would be ineffective and incomplete, unless the same or similar relief is granted to the Trustee.

III.

The Trustee, Movant herein, has never been formally served or otherwise notified of the order complained of, and only discovered it upon his personal examination of the Court's file, after receiving the Memorandum Opinion of Trustee's Complaint issued July 21, 1977.

WHEREFORE, PREMISES CONSIDERED, your Movant prays that after just trial or hearing hereon, that Judgement be rendered setting aside the Judgement or Order directing turn-over of property to Receiver, as previously entered, that Judgement be entered for your Movant, OSCAR NIPPER, Trustee for the Taurus Trust, in conformity with the Judgement for entry with respect to the Defendant, COOK, that costs of court previously assessed against Defendant OSCAR NIPPER, Trustee for the Taurus Trust, be taxed against the Plaintiffs, that OSCAR NIPPER, Trustee for the Taurus Trust, recover all his right, title and interest to the property in dispute, and/or that separate Judgement rendered for Defendant, COOK, and for such other and further relief, at law and in equity, to which your Movant may show himself justly entitled, and for which he will ever pray.

Respectfully submitted,

.....

JOHN W. OVERTON
7654 Park Place Blvd.
Houston, Texas 77087
(713) 643-5274

D-3

FIAT

HEARING on the above Motion is set for the 17th day of October, 1977, at 9.45 a.m. in the Court of the United States Bankruptcy Judge JOHN R. BLINN.

JOHN R. BLINN
Judge Presiding

CERTIFICATE OF SERVICE

I, John Overton, do hereby certify that a copy of the above and foregoing Motion for Relief from Judgment or Order, was mailed, Certified Mail, Return Receipt Requested, to the attorneys being named:

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Lake Jackson, Texas 77566

.....
JOHN W. OVERTON

CERTIFICATE OF SERVICE

I, Thad T. Hutcheson, a member of the Bar of this Court, certify that three copies of the foregoing Reply to the Petition for Writ of Certiorari have been served upon Oscar Nipper, attorney of record for Sam Pena and Oscar Nipper, Trustee, Petitioners, 7654 Park Place Boulevard, Houston, Texas 77087, and upon James S. Taylor, attorney of record for William L. Cook, Jr., 1400 South Post Oak Suite 901, Houston, Texas 77056, by depositing said copies in the United States mails, with first class postage prepaid, addressed to the above-named counsel at their respective post office addresses, on this .... day of January, 1981.

.....

THAD T. HUTCHESON